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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1016

JACKSON D. LEONARD,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF JACKSON D. LEONARD

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Introduction

Petitioner submits this brief in reply to the brief for the United States* in opposition to Leonard's Petition for Certiorari. Before turning to the government's legal and

* "U.S. Brief" refers to the brief filed by the Solicitor General; "Petition" refers to the Petition for Certiorari filed by Jackson D. Leonard; "PA" refers to the Appendix in the Petition; "Supplement" refers to the Supplement to the Petition; "SPA" refers to the Appendix in the Supplement; "G. Br." refers to the government's brief in the Court of Appeals; "A. Br." to appellant's brief in the Court of Appeals; "GX" to government trial exhibits; "DX" to defendant's exhibit; "CX" to court exhibits; "DXH" to defendant's hearing exhibits; "GXH" to government's hearing exhibits; "A" to appendix in the Court of Appeals; "E" to the exhibit volume in the Court of Appeals.

factual arguments, however, which, for the reasons set forth below, Leonard contends are without merit, Petitioner wishes to call to the Court's attention the fact that the government's brief was not served on Petitioner's counsel until April 15, 1976, and was apparently not mailed until April 13, 1976, although this Court, on March 12, 1976, ordered the government to file its brief on or before March 31, 1976.

ARGUMENT

POINT I

The IRS investigation of Leonard was clearly a criminal investigation. It was a direct outgrowth either of the FBA project or of an informant's allegations.

Notwithstanding the criminal nature of the investigation, the IRS agents did not give Leonard at the outset the warnings the IRS's own regulations require.

Consequently, this Court is faced with a conflict between the First, Fourth and Ninth Circuits, and the Second Circuit, on whether the IRS should be compelled to follow its announced procedures in criminal tax investigations.

A. The investigation of Leonard was criminal from its inception.

The investigation of Leonard was triggered either by data disclosed in the course of the IRS's massive mail watch, one of the initial phases of the Foreign Bank Account ("FBA") project, or by an informant's allegations of criminal misconduct. In either case, for the reasons set forth below and in Leonard's Petition herein, the investigation of Leonard was criminal from its inception.

1. The FBA project was a criminal investigation and was conducted as a criminal investigation.

Although the government has now apparently abandoned its position below that the FBA project was merely designed to develop "civil audit techniques", it still persists in its denial that the FBA project was an Intelligence Division program devoted to detecting and prosecuting American taxpayers who were maintaining Swiss bank accounts, and that the indictment and conviction of Leonard was a direct outgrowth of that effort.

A review of the record, however, clearly demonstrates the criminal nature of the FBA project and the impropriety of the use against Leonard of information developed as a result.

Since petitioner's principal brief in support of his Petition for Certiorari describes in some detail the FBA project and particularly the "Swiss mail watch" (which was an integral part of it), this reply shall merely set forth, without substantial elaboration, the principal factors that demonstrate the criminal nature of the FBA project:

(a) The FBA project originated in the Intelligence Division of the IRS (which conducts only criminal investigations), and the Swiss mail watch was initially performed solely by Special Agents, who had previously obtained lists of Swiss bank postage meter numbers and thereafter produced computer printouts of taxpayers and the Swiss banks with which they corresponded.*

(b) The IRS, pursuant to Part 861 of the Post Office Manual, represented to the Post Office that the FBA project was a criminal investigation.**

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* Only subsequently did Revenue Agents become involved and then only under the general direction of the Intelligence Division. See *infra*, page 4.

** The petitioner's argument with respect to this representation has been mischaracterized both by the government and the Court of Appeals, which asserted that it did "not follow that *every* per-

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(c) Revenue Agents who worked on the FBA project operated under the supervision of the Intelligence Division, and together with the Intelligence Division, selected the taxpayers who were targeted for investigation.*

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son whose name turned up in the print-out as probably having a Swiss bank account was suspected [by the IRS] of committing such a crime." U.S. Brief, p. 11; PA p. 21a. This has never been petitioner's position. Following the mail watch, the Special Agent in charge of the FBA project (with the assistance of a Revenue Agent) reviewed untold numbers of tax returns of those persons who surfaced from the mail watch. The record below is clear that the 110 taxpayers in New York alone targeted for investigation in the FBA project were selected not by the normal criteria then applicable to whether a taxpayer should be *audited*, but rather were selected because their returns failed to disclose any Swiss bank account. In short, the targeted taxpayers, including Leonard, were selected for FBA investigation precisely because the IRS "suspected [they were] committing such a crime", demonstrating that the IRS viewed the FBA project as a criminal investigation.

Indeed, this fact would likely have emerged from the written representation by the IRS to the Post Office, which has *never* been produced. In fact, the Court of Appeals' decision below is based on what it assumes must be contained in such a letter. As noted *infra* in Point IV, the government's obstruction of petitioner's pretrial questioning of prospective witnesses on the subject of the mail watch prevented petitioner's discovery that there was a requirement of a letter and further that there were internal (nonpublic) Post Office regulations on the subject. (These regulations were not officiallly published until three days after Leonard was sentenced. Counsel discovered them only by virtue of a Freedom of Information Act request made while this case was on appeal to the Second Circuit. See Appendix E to Petition, p. 35a.) Further, when Leonard learned just prior to trial that there had been a mail watch, he issued subpoenas to the IRS for all relevant documents. Although Leonard was unaware that there were postal regulations which required the IRS to obtain written authority from the Post Office for the massive mail watch, the subpoenas would have produced the missing letter, if the trial court had not quashed it. The contents of the IRS letter to the Post Office, if one even exists, remain to this date a complete mystery.

* This is standard IRS procedure in criminal tax investigations. In such investigations, a Special Agent runs the investigation and is assisted by one or more Revenue Agents who work under his direction.

(d) The practices used in conducting the "audits" of taxpayers so selected were not the routine audit procedures normally followed but were criminal investigation techniques, programmed by the Special Agent in charge, which included an official policy of withholding from the taxpayer information obtained through the mail cover* and surreptitiously avoidng a taxpayer's "accountants or attorneys" in order to confront the taxpayer personally and obtain incriminating statements directly from him.** Indeed, the Revenue Agents were given a special booklet of instructions prepared by the Intelligence Division (with the assistance of the Audit Division), on how to conduct the FBA "audits".

(e) The follow-up tactic of seeking an affidavit confirming the oral denial, which was done at the direction of the Intelligence Division, served no legitimate Audit Division purpose (since the affidavit was only

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* It was apparently the decision of the Special Agent in charge of the FBA project that Revenue Agents withhold mail cover information from the taxpayer during the audits. This was clearly a criminal investigatory technique. Since an auditor's function is to determine the correct tax liability on the basis of all the facts, he necessarily must follow the practice of advising the taxpayer of all entries or apparent omissions which require explanation. Therefore, the concealment of facts which might elicit additional information is inherently inconsistent with basic auditing objectives and therefore contradicts the government's contention that the FBA project was strictly "civil". Despite this, concealment was the official policy.

** The use of Revenue Agents (who were instructed to maneuver personal confrontations with the taxpayer) to conduct the alleged "audits" was obviously designed to conceal from the taxpayer the true criminal nature of the investigation and to obtain incriminating statements without the benefit of the required warnings. The government's claim below that the FBA investigation was strictly a "civil project designed to perfect audit techniques relevant to foreign bank accounts" is at most only a small fraction of the story, and at worst, a patent sham. Additionally, the FBA investigation was "top secret" and was not disclosed even to other IRS agents except on a "need-to-know" basis (A 283a), which is clearly characteristic of a criminal (not a civil) investigation.

obtained if the agent doing the "audit" found no independent corroboration of the information derived from the mail watch).*

(f) During the alleged "audit" stage of the FBA project, the Special Agent directing the investigation referred some 20 taxpayers (who had orally denied having a Swiss account and who had signed the affidavits confirming the denial) directly to the criminal division of the U.S. Attorney's Office for the Southern District of New York for questioning before federal grand juries.**

2. Informant's allegations are clearly treated by the IRS as bases for criminal proceedings.

Although the government concedes that the "audit" of Leonard was generated at least in part by an allegation by an informant that Leonard was receiving illegal kick-backs, the government has wholly failed to respond to petitioner's contention that the IRS's firm practice in 1968 was to refer informants' reports of criminal misconduct to the IRS's Intelligence Division, which as noted, conducts only criminal investigations.***

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* Indeed, this tactic demonstrates what Agent Morris unwittingly admitted at the pretrial hearing, namely that the affidavit was a "technique" to squeeze an admission out from the taxpayer who, if he "ha[d] to put something in writing . . . he's apt to think twice rather than just saying 'No, I don't have an account' . . . and that was the purpose of this [affidavit]." (A 370a)

** The standard practice in the IRS is for cases audited by Revenue Agents (in the Audit Division) to be referred to the Intelligence Division when there appear to be criminal aspects. Thereafter, the procedure is for the Intelligence Division, after it own investigation (with the assistance of the Revenue Agent) to refer such cases to the Justice Department and the U.S. Attorney's Office for prosecution. The fact that some 20 taxpayers were referred directly from the FBA project to a local federal prosecutor's office clearly demonstrates that the FBA project was a criminal investigation and not a "civil audit project", as contended by the government before the Court of Appeals.

*** Indeed, at the pre-trial hearing, Revenue Agent Morris (the only witness called by the government) testified that in New York,

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The government seeks to avoid the obvious consequences of this policy by lamely arguing that the informants' allegations proved to be untrue and that, as a consequence, they did not result in Leonard's indictment or conviction. Entirely overlooked by the government, however, is the fact that the money omitted by Leonard in 1967 and 1968 was the very money that the informant erroneously claimed as "illegal kickbacks". Further there is nothing in the record that suggests that Leonard's 1967 and 1968 tax returns would have been investigated at all but for the FBA project or the informants' allegations, and that investigation clearly developed the incriminating evidence that Leonard failed to report all of his income in those years.

B. It is immaterial that the "audit" was performed by Revenue Agents as distinguished from Special Agents.

Although the government concedes that Leonard was not given any warnings that he was the subject of a criminal investigation during the first two years of his "audit" (a period during which Leonard allegedly made a number

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such allegations were only sent to the Audit Division for preliminary investigation when there was a "manpower" shortage in the Intelligence Division:

> "Q. 'Information items' which are sent to the Internal Revenue Service are referred to the Intelligence Division, are they not? A. *At first, yes.*
>
> Q. And then, after the special agents look at them, they sometimes give them to the revenue officers [sic, revenue agents] to investigate; is that right? A. The revenue agent. Yes. The revenue officer is another person entirely.
>
> Q. The revenue agent. I beg your pardon. A. Yes. A certain portion are sent to Intelligence, and *if they can't handle them, because of limited manpower* [then] *they send it to the Auditing Division,* which screens it out for productivity and sends it to—
>
> Q. They keep some themselves and give others to Audit; is that right? A. Yes.
>
> Q. And was that done in the Leonard case with respect to the information item? A. I presume so.
>
> Q. You don't know? A. No." [Emphasis added] (A. 414a-415a).

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of damaging disclosures and signed the "Swiss bank affidavit"),* it contends that no violation of IRS procedures thus resulted because the "audit" was conducted by a *Revenue* Agent and not a *Special* Agent, and the IRS news releases refer only to the conduct required of *Special Agents.*

Here the government is clearly exalting form over substance, since there can be no doubt that Revenue Agent Laski was performing the functions of a Special Agent throughout his investigation of Leonard. As the district court stated unequivocally in *United States* v. *Harary,* 70 Cr. 1104 (C.M.M.) (SDNY 4/23/71), 71-1 USTC § 9362, the standards of conduct set forth by the IRS news release apply equally to *Revenue* Agents (as well as Special Agents) conducting non-custodial criminal investigations.

Indeed this Court has also emphasized in *Mathis* v. *United States,* 391 U.S. 1 (1968), that it is the reality of the situation, rather than the nominal status of the government employee, that determines whether there is a requirement to give warnings.

There is even greater need for warnings where a criminal investigation is conducted by *Revenue* Agents, instead of *Special* Agents, since the use of a Revenue Agent in a criminal investigation is inherently misleading and is likely to lull the taxpayer into a false sense of security (especially in view of the IRS's public press releases on the subject). See *United States* v. *Sicillia,* 475 F.2d 303, 308, 310 (7th Cir. 1973), *cert. denied,* 414 U.S. 865 (1973).

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* The government brief obscures this fact by asserting that after Leonard's case had been officially referred to the Intelligence Division from the FBA project, the Special Agents who *thereafter* interviewed Leonard gave him the required warnings. However, the damage had already been done since the "Revenue Agent" assigned to the FBA project had previously obtained from Leonard incriminating documents and information, without the benefit of the warnings.

Moreover, since the government conceded that the only time Revenue Agents are used to investigate informants' allegations is when Special Agents are not available for such work, the fact that the investigation of Leonard commenced when there was a manpower shortage in the Investigation Division should not lead to the conclusion that Leonard was not entitled to warnings. Leonard's right to proscribed warning should not be dependent on the fortuitous occurrence that the informants' allegations happen to have been received in the summer of 1968 when many Special Agents were on vacation.

Consequently, this Court is faced with a conflict between the First, Fourth and Ninth Circuits, and the Second Circuit, on whether the IRS should be compelled to follow its announced procedures in criminal tax investigations, and only a decision of this Court can clarify the circumstances under which warnings must be given.

POINT II

The government concedes that the primary issue at trial was the defendant's wilfulness.

The proof of wilfulness consisted largely of the allegedly false Swiss-bank affidavit and Eva Brooke's testimony.*

Eva Brooke's testimony was "tainted" by improper threats which were not disclosed at trial.

There was in fact insufficient proof of the alleged falsity of the Swiss-bank affidavit.

The government concedes that "wilfulness" was the primary issue at trial, but fails to address itself to the cir-

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* The government contends that "wilfulness" was also allegedly shown by petitioner's assertedly "clumsy attempt to delete the 10% override provision from the . . . contract." However, the record demonstrates that this override was in fact actually deleted by Union Carbide Corporation ("UCC"). Initially two chemical plants were to have been built, the first in Taft, Louisiana and the

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cumstances surrounding its key evidence of "wilfulness", the testimony of Eva Brooke.

Since the Supplement to the Petition describes at length the improper threats and false statements made by the government to induce Mrs. Brooke, a British citizen and resident, to come to the United States to testify against petitioner, it is only necessary at this time to emphasize that the government's failure to bring these threats and statements to petitioner's counsel's attention at trial so deprived petitioner of the opportunity for full cross-examination of the government's key witness as to justify, on that fact alone, reversal of the conviction.

As the Second Circuit observed in an analogous situation in *United States* v. *Miller*, 411 F.2d 825, 831 (2nd Cir. 1969), when the government has a duty to disclose information about its dealings with a prosecution witness

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second in South Charleston, West Virginia. The South Charleston plant, while planned, was never built. While this did not impair Leonard's right to the $750,000 in fees from UCC, his right to an additional 10% override on the engineering work for the South Charleston plant was cancelled since no such work was to be done, which is undoubtedly the reason why the provision had been crossed out on this particular copy of the UCC contract. Further, the government claims that this copy of the UCC contract was exhibited by Leonard to the agent during the investigation, U.S. Brief pp. 4-5. This contention is inaccurate; rather, his accountant, who had conducted the audit, showed the copy to the agent, which copy was probably a working copy. Indeed, a second marked-up work copy was also introduced by the government at trial, GX 67 at E 220, which deleted references to all monies to be paid to Leonard. This copy, containing a note from Leonard to his assistant and stating "Bob, for your info", was obviously an effort by Leonard to properly not reveal to his employee what he was being paid on the project. Thus, the alleged evidence of "wilfulness" relied upon by the government was entirely innocent. See also, GX 75, a letter written by Leonard to UCC, dated April 24, 1968, which discusses the deletion of the 10% override on the engineering work for the South Charleston plant.

and fails to discharge that responsibility:

> ". . . a motion for a new trial must be granted if there is a significant possibility that the undisclosed evidence *might* have led to an acquittal or a hung jury . . ." (Emphasis supplied)

Certainly that test is met here: Mrs. Brooke's testimony was procured by duress, a fact the jury would certainly be entitled to take into account in determining its credibility. Compare, *United States* v. *Badalamente,* 507 F.2d 12 (2nd Cir. 1974), *cert. denied,* 421 U.S. 911 (1975), where the Second Circuit reversed a conviction because the prosecutor did not reveal to defense counsel that a key government witness had sent a letter to the trial judge which indicated that the United States attorney's office had applied extreme pressure to make him testify.

The other alleged "similar act" evidence, the Swiss-bank affidavit, drafted entirely by Agent Laski, was literally true.*

The government contended below, however, that the $383,000 received by Leonard in 1968 from Chase Manhattan in the form of its own "official" checks established that Leonard had "dealings" or "transactions" with a foreign bank. This contention is without merit.

Leonard's receipt of the Chase Manhattan Bank checks in New York was a *direct* "dealing" or "transaction" with a domestic bank (Chase Manhattan Bank), and not a Swiss bank. There was no proof offered by the government that Leonard even knew that Chase had paid the money at the

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* The Swiss-bank affidavit reads as follows:

"(1) I do not now and I have not had any foreign bank accounts;" and

"(2) I have not had any transactions or dealings of any nature with any foreign banks or other representatives except for (specified loans in Australia and currency conversions.)" (GX 74 at E 281).

direction of a foreign bank, let alone that Leonard was the source himself. At most, the checks constituted an "indirect" dealing with a Swiss bank. Indeed the government conceded in its summation that the Swiss-bank affidavit did not address itself to indirect transactions—i.e. "it doesn't say anything about . . . indirect dealings with foreign banks" but nonetheless chided Leonard for the omission (A. 949).

More particularly despite the fact that a government agent had drafted the affidavit and thereby established the scope and extent of Leonard's denial, the government argued that the $383,000 in Chase Manhattan Bank checks were evidence that the Swiss bank affidavit was false, since (according to the argument then made) Leonard "should have disclosed" indirect transactions with a foreign bank (A. 949). Indeed, the Court of Appeals' characterization of Leonard's argument with respect to the literal truthfulness of the affidavit as "formal to an extreme" is tacit, but strong, acknowledgment of the validity of his position. It also refutes the government's claim here that this evidence would meet the "plain, clear, and convincing" standard in *United States* v. *Lawrance*, 480 F.2d 688 (5th Cir. 1973) and *Kraft* v. *U.S.*, 238 F.2d 794 (8th Cir. 1956).

Thus, in view of the real lack of evidence on "wilfulness," the prosecutor's analysis (stated to Mrs. Brooke) that its case rested on Mrs. Brooke, who was in its view a "key witness" with "crucial" testimony was clearly correct. Consequently, since her testimony was "tainted", Leonard's conviction should be reversed and a new trial granted.

POINT III

The government's argument on the mail watch fails to consider the issue raised by the Petition that the mail watch violated applicable Post Office regulations.

The unlimited scope of the FBA project mail watch, conducted by IRS agents, constituted a violation of the Post Office regulations.

The government's brief carefully refrains from responding to appellant's argument that the unlimited scope of the FBA project mail watch (in which all mail from Switzerland, lacking a return address, was intercepted and microfilmed over two four-month periods in 1968 and 1969) was improper under then current Post Office regulations.

As noted in the Petition in chief, the Post Office regulations simply do not authorize such a "dragnet" approach, but require "specificity" as to each mail cover subject for whom a law enforcement agency requests a mail watch. Petition page 21, Part 861.42b., *Post Office Manual.* Here, literally thousands (if not hundreds of thousands) of Americans had their mail from Switzerland photographed, where the government, prior to the mail watch, had absolutely no reason to believe that such persons were committing or attempting to commit a crime (A. 379a). Part 861, *Post Office Manual.* The government therefore appears to concede that the mail watch utilized in the FBA project violated Post Office regulations.

POINT IV

The petitioner was prejudiced by the prosecutor's obstruction of interviews of prospective witnesses. At the very least, the obstruction prevented him from discovering either the massive nature of the mail watch (until the hearing, which itself was scheduled on short notice) or the applicable (internal) Post Office regulations.

The defendant neither had access to nor knowledge of these regulations, which were only first published in the Federal Register March 11, 1975, three days after Leonard was sentenced.

Consequently, Leonard was prevented from obtaining the very document which might have demonstrated that the FBA project was an Intelligence Division operation and therefore a criminal investigation.

The government contends that the prosecutor's instructions to the prospective witnesses (who had voluntarily made themselves available) not to answer questions posed by Leonard during pretrial interviews concerning the "mail watch", the reason why Revenue Agent Laski initially asked Leonard about foreign bank accounts and conversations between the agents, did not prejudice the defendant. This contention is without merit.

First, it must be noted that the petitioner has never contended that *the government* was required to submit the prospective witnesses (who happened to have been agents) for pretrial interviews. Leonard, however, wrote each of seven specific prospective witnesses and asked that they make themselves available for interview. All seven thereafter voluntarily agreed to do so and in fact did. Accordingly, there is no validity to the government's position that petitioner's argument herein is an effort to obtain more pretrial discovery than permitted by the rules. U.S. Brief p. 13.

Consequently, after the witnesses voluntarily chose to make themselves available, it was completely improper for the prosecutor to have interfered with the interviews. *United States* v. *Matlock*, 491 F.2d 504 (6th Cir. 1974); *Gregory* v. *United States*, 369 F.2d 185 (D.C. Cir. 1966); *United States* v. *King*, 368 F. Supp. 130 (M.D. Fla. 1973); *Johnston* v. *NBC, Inc.*, 356 F. Supp. 904 (E.D.N.Y. 1973); *Coppolino* v. *Helpern*, 266 F. Supp. 930 (S.D.N.Y. 1967).

The obstruction by the prosecutor took a number of different forms. At the outset, even though the interviews were not to be civil depositions, the prosecutor insisted that the interviews be recorded by a court stenographer and Leonard consented (A. 477a-479a). Thereafter, the prosecutor instructed witnesses not to answer questions where its objections were limited only to the form of the question (E.g. A. 108a-109a, 113a-115a, 123a, 125a, 127a, 165a). Indeed, if the interviews were depositions taken for a civil case, such technical objections would not justify an instruction to the witness not to answer. Rule 30(c), F.R. Civ. Pr.

Second, when the prosecutor permitted at least one of the interviews to develop to a stage where Leonard's appetite had been whetted by the limited information that was disclosed (see, for example, Agent Schulman interview quoted at A. Br. 49-50), the government then insisted that if Leonard wanted further information he could obtain it at a price—the price being the waiver of his Fifth Amendment privilege. Indeed, although Leonard's counsel objected, the government stated the choice in dramatic terms:

> "Prosecutor: Great. If and when you want to tender his box and stop claiming the Fifth on all of the evidence he possesses, then I will change the rules [and permit unobstructed questioning] . . . (A. 244a)"

In short, the government offered Leonard unfettered access to the prospective witnesses on condition that he waive his

Fifth Amendment privilege and "tendered . . . all the evidence he possesse[d]", a Hobson's choice not unlike that disapproved by this Court in *United States* v. *Marchetti*, 390 U.S. 39 (1968) and *Grosso* v. *United States*, 390 U.S. 62 (1968).

Where a prosecutor's conduct violates a defendant's constitutional rights, the defendant need not establish prejudice, since the misconduct may itself prevent a defendant from making such a showing. See *Gregory* v. *U. S.*, *supra*.

Nonetheless there was substantial prejudice suffered by Leonard as a result of the course adopted by the prosecutor. The first time that Leonard's counsel learned that the IRS investigation of Leonard was an FBA project case was on January 6, 1975, when Laski revealed it during his interview (A. 316a-317a). The very next day, January 7, 1975, counsel immediately brought this to the attention of the court (A. 317a), and, since the case was to be tried the following day, made an oral motion because he had not "had time to type it up" (A. 316a).

The oral motion to suppress Leonard's statements and affidavit given to agent Laski was based on two arguments: first, that by conducting a criminal investigation (i.e., an FBA investigation), Laski was performing the function of a Special Agent and therefore, by IRS regulations, was required, but failed, to give Leonard specified warnings and, second, that there appeared to have been a "mail cover" which counsel "hope[d] to establish . . . as illegal."

At this stage, however, counsel was not sure that Leonard was actually the subject of a mail cover, since the government specifically blocked questions at Laski's interview that would have elicited this information (A. 122a, 123a). He therefore requested that the trial judge issue an order instructing the government, pursuant to the "Judge Otto Kerner" case [*United States* v. *Isaacs*, 347

F. Supp. 743 (N.D. Ill. 1972)], to inform him whether there was a mail cover (A. 320a-321a, 33a).

When the trial court asked "that Leonard here be informed as to whether there was a mail cover and the details of it", the government responded as follows:

> Prosecutor: "I am prepared to inform the court, I hope in helpful fashion, certainly not to the detail and to th[e] extent that the judge in Illinois asked for information. I have in my possession photostats or photographs of half a dozen envelopes addressed to Mr. Leonard both at his home and his home at Union Plaza. I will make those available to counsel.
>
> "I am informed that those were made back in 196— well, the time I am uncertain about. I think in the early months of 1968 and 1969 *by the postal authorities,* that is, the mail was passing through on the way to being delivered to Mr. Leonard." (A. 333a-334a) [Emphasis added]

The government then mentioned for the first time that there was an informant's report concerning the Treadwell payments and further that the mail watch "kicked out" information "at the same time" concerning Leonard's having correspondence with Swiss banks (A. 334a). However, at this point the government's disclosure was very limited; it merely confirmed that there had been a mail watch, while not disclosing its extent. Moreover, the prosecutor's statement that the photographs of the "half a dozen" envelopes were made "by the postal authorities" was ultimately established as inaccurate. In any event, the court scheduled a hearing for three days after, January 10, 1975 at 10:00 A.M.

Leonard immediately prepared subpoenas *duces tecum* for service on the District Director of the IRS, the Regional IRS Commissioner—New York and Regional Counsel, New York, and the Secretary of State and Swiss Desk Officer,

returnable on January 10th, the day the hearing was then scheduled (A. 419a, 389a).

However, on the following day (and in fact on less than a half a day's notice) (A. 389a), the government expedited the hearing date to that very afternoon, January 8, 1975, at which time the government called its one witness, Revenue Agent Bernard Morris, to testify about the "essentially civil nature" of the FBA project.

For the first time, it was revealed that there had been a massive mail watch, in which all envelopes from Switzerland arriving at Kennedy Airport and lacking a return address were microfilmed by Special Agents of the IRS (and not "by postal authorities" as previously represented) on machines which photographed 3,600 envelopes an hour (A. 375a-381a). It was only at this point that the unlimited nature of the mail watch was disclosed.

However, the applicable Post Office regulations were not yet published and therefore were not available to Leonard's counsel. Accordingly, the prosecutor's instructions to Agent Laski not to answer "mail watch" or Swiss bank questions prevented counsel from discovering that the IRS had represented (and indeed was required by internal Post Office regulations to represent) to the Post Office that it was conducting a criminal investigation.

Consequently, Leonard was severely prejudiced by the prosecutor's obstruction of his pretrial interviews of prospective witnesses. Indeed, the Court of Appeals' decision below stated that Leonard had failed to convince it that the FBA investigation was criminal. Leonard submits that there is overwhelming evidence that the FBA project was a criminal investigation and further that the

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* As noted, *supra*, footnote, page 4, the written request was never produced by the government below, although subpoenas served by the defendant, but quashed by the court, would have required production.

IRS intentionally used Revenue Agents, rather than Special Agents, to obscure that fact. In any event, however, the government's obstructions of interviews of the witnesses (who, it must be emphasized, voluntarily made themselves available) prevented Leonard from learning about and thus obtaining the very document which would have established what the Court of Appeals said was missing, namely, proof that the FBA project was an Intelligence Division operation and therefore a criminal investigation.

Thus, the prosecutor restricted petitioner's access to essential information which might have led to possible defenses and witnesses, and therefore improperly hampered his ability to prepare a defense.

CONCLUSION

For the foregoing reasons, the Petition should be granted and a writ of certiorari should be issued to review the decision below.

Respectfully submitted,

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